Johore Bahru. These dealers gave evidence that they did not sell these goods. They said the receipts produced were receipts issued by them in respect of other goods. I see no reason to disagree with the District Judge that these witnesses were honest witnesses and that their evidence is true. It has been argued for the Defence that these dealers gave false evidence because they feared they might get into trouble with the Customs if they admitted having sold these goods, as they would then be called upon to account for the customs duties. I see no reason to accept this view of the Defence.

The result is that the accused has been found to be in possession of goods suspected of having been uncustomed, and he has not discharged the onus of proving that these goods were customed.

The appeal is dismissed and the conviction and the sentence are confirmed.

Appeal Dismissed.

MEK BINTE AWANG v. CHE MAS BINTE AWANG.

[Crim. Revision (Taylor, J.) September 24, 1947]

Criminal Procedure Code Ss. 66a, 173a, 293 and 294 — Binding Over — Order of "Caution and Discharge" — Personal Opinion of Magistrate — Penal Code, S. 323.

The Magistrate on a private summons for voluntarily causing hurt convicted both the accused and complainant of affray and cautioned and discharged them. The case was submitted by the Public Prosecutor to the High Court with a view to revision.

Held, on review of the case that the Magistrate had no jurisdiction to convict the complainant, that in any event he had failed to make clear to the parties the effect of his decision, that he had improperly supplemented the evidence from his personal opinions and that the conviction must be set aside.

Semble. A Complainant cannot be convicted, but may by the proper procedure be bound over. This power should be used sparingly and carefully.

The expression "Cautioned and Discharged" is not authorised by law and it is not satisfactory in practice because it leaves the matter in doubt whether the Court actually found the accused guilty of an offence or not.

REVISION.

Parties in person.

Taylor, J. : — This is a revision of the proceedings before a Magistrate on a private summons for voluntarily causing hurt under Section 323 of the Penal Code.

Both parties are married women living in the same kampong. The complainant is aged about 25 years and the accused still in her teens. There has been jealousy between them over family affairs.

The complainant's story, which was supported with consistent detail by two witnesses, was that while she was bathing at the well near her house, the accused came and assaulted her; all three testified that the accused was alone.

The accused admitted a scuffle but stated that it took place on the public road and that the complainant provoked the incident by throwing water on her. This was supported by one witness, her niece, aged about 13, who did not see the two witnesses for complainant.

At the close of the case the learned Magistrate wrote :—

> "According to the evidence both accused and complainant guilty of affray. Cautioned and discharged".

The complainant was dissatisfied and sent what is in substance a petition of appeal to the Public Prosecutor who submitted the case to the High Court with a view to revision.

In his Grounds of Judgment the Magistrate says that among the local Malays especially women, whenever one hits another with the hand, the other will automatically challenge and thus commit an affray; he has seen such occurrences many times. From the evidence he found it difficult to conclude which side was telling the truth but by putting the evidence of both sides together he found that they had committed an affray and, therefore, convicted them both, the complainant as well as the accused. But taking into consideration that the fight was not serious and neither of the women suffered any injury they were cautioned and discharged.

The Magistrate has recorded the evidence for both sides, including the cross examination, very clearly and, I have no doubt, accurately but his determination of the case is not in accordance either with the principles of justice or with legal procedure. It is quite clear that, feeling some doubt about the case, he substituted his own opinion of what was probable for the evidence. This was certainly improper. It is, of course, right and necessary that Magistrates should apply their own knowledge and experience to the weighing and interpretation of evidence, but that is quite a different thing. The judgment must be found on the actual evidence.

The prosecution must prove every fact necessary to establish the truth of the charge and this applies equally to private summons cases and official prosecution. If, at the close of the evidence, the Magistrate was not convinced that the complainant had established her case he should have given the accused the benefit

of the doubt and acquitted her. Actually he convicted them both, but of a different offence.

It is vital to justice that every person accused of any offence, however trivial, should be definitely charged and should have an opportunity to defend himself. I will deal first with the case of the complainant. No prosecution was ever instituted against her; no information was laid; she was not summoned; she was not charged. She was never called upon to plead. It is true that she had cross-examined the witnesses for the other side, but not from the point of view of a case against herself. She had no opportunity of defence or extenuation. The decision was not founded on a real weighing of the evidence. Judgment was not clearly pronounced.

Quite apart, therefore, from any question of the merits, her conviction infringed the basic principles on which justice is administered. There is also a practical objection. It was useless.

The complainant was dissatisfied with the result because she thought the accused had been acquitted and she tried to appeal on that ground. But in her petition she said nothing about her own conviction, because she did not know of it. She does not know even now. During the hearing of the application for revision she said, in answer to me, that at the end of the trial she was "told to go home — case dismissed". Manifestly it is utterly useless to convict a person of anything if the fact that he has been convicted is not made clear to him.

If the Magistrate considered that the circumstances required him to take some action against the complainant he should have applied Section 66A of the Criminal Procedure Code and called upon her to show cause why she should not give security for her future good behaviour. In doing so he would have been bound to observe that minimum of judicial procedure which the bare principles of justice absolutely require — that is, he should have read and explained to her exactly what was alleged against her, given her a full opportunity to shew cause, and carefully noted on the record of the proceedings the fact that this had been done and the substance of her answer. "Summarily" does not mean that the ordinary judicial stages in Court can be omitted. It only means that the preliminary steps for instituting proceedings may, in the circumstances set out in the section, be dispensed with.

I would remark here that this power to turn the tables on a misguided complainant should be used sparingly and Magistrates not yet of wide experience should be especially careful to follow the procedure as laid down.

I have only to add on this part of the case that I do not find that the complainant was innocent. Quite possibly there was a small affray at the cross roads or the complainant may have committed a minor assault there but she was never on trial.

I now turn to the case against the accused, who was the respondent on revision. She was charged with voluntarily causing hurt. The evidence of the parties appeared to the Magistrate to be in conflict but he found them both guilty of affray. He says he reached his conclusion by putting together the evidence of both sides but I am unable to accept this. If he really had added the two together he would have found that there were two incidents or at least an incident in two distinct stages — the first a scuffle at the cross roads and later, after a distinct interval, a separate assault by the accused in which she was plainly the aggressor.

As regards the conviction for affray two points arise. First on the facts — not every fight is an affray; the essence of affray is breach of the peace and this offence is not committed unless the fight is in a public place. He could not properly have convicted them of affray unless he was satisfied that the fight in question took place at the cross roads, as alleged by the accused, and not at the well in complainant's compound as alleged by the complainant, and he did not so find. Secondly, on legal procedure — the accused was never charged with affray; there are cases when re-charging is not necessary, e.g. on a charge for causing grievous hurt, if the hurt is proved but not the intention to cause grievous hurt, the accused may be convicted of voluntarily causing (simple) hurt without formal amendment because the greater includes the the less. But if the alternative offence, even though less serious, involves some other ingredient, such as being in public, then the charge must be altered and the alteration explained and the accused must plead again.

Finally, the Magistrate's order was neither clear nor correct. The expression "cautioned and discharged" has, no doubt, been used in the past but it is not authorised by law and it is not satisfactory in practice because it leaves the matter in doubt whether the Court actually found the accused guilty of an offence or not.

The Code requires that where a person is found guilty of an offence, he must be sentenced according to law. If the offence is considered trivial, the appropriate course is to impose a nominal fine, such as

one dollar or even 10 cts. There are three exceptions to this :—

(a) A youthful offender may be convicted, admonished and discharged under Section 293;

(b) A first offender may be convicted and released on probation, under Section 294;

(c) In special circumstances set out in Section 173A a charge may be dismissed, provided that a conviction has not been recorded.

In all cases it is important that the record should clearly show what has been decided and what was the actual order. It is a very grave mistake to regard these matters as in the nature of "red tape" or to disregard any of them even in a trivial case. A great many of the important rights of the subject under the English law are not expressed in any substantive statute but are guarded and enforced only by rules of procedure. This may, and indeed does, make the Codes cumbersome and in some ways difficult to follow but however difficult it may be, Magistrates must study them closely and apply them strictly, in all circumstances.

In my opinion, the evidence in this case was sufficient to show that the accused had committed an assault of a more than trivial character on the complainant and the Magistrate should have found the accused guilty accordingly under Section 323. In exercise of the powers of revision, I accordingly amend the conviction of the accused for affray to a conviction for causing hurt but in view of her youth and of the facts that the assault was not very serious and that the two families are connected, I think it is sufficient to release her as a first offender on giving a bond with one surety for $25/- for her good behaviour for 3 months under Section 294 of the Code.

Order Accordingly.

PUBLIC PROSECUTOR v. ANNUAR BIN ALI.

[Orig. Crim. Juris. (Spenser-Wilkinson, J.) October 1, 1946]

Criminal Procedure Code Section 190 — Trial with Assessors — Submission of no case to meet.

In this case the accused was charged with murder. At the close of the case for the prosecution, Counsel for the defence made a submission under Section 190 of the Criminal Procedure Code that no case had been made out which would warrant a conviction.

Held, that in a trial with Assessors unless it is clear to the Judge at the close of the case for the prosecution that the assessors could not reasonably find the accused guilty on the evidence adduced if full weight be given to it, then the accused must be called upon for his defence.

Case referred to :—

(4) *Public Prosecutor, Johore v. Fong Ah Tong and another* (1940) M.L.J. 240.

CRIMINAL TRIAL.

A. J. Grattan-Bellew (D. P. P.) for the Public Prosecutor.

H. Y. Teh for the Accused.

Spenser-Wilkinson, J. : — In this case the accused was charged with murder. The facts were that the deceased was found lying beside the path about 10 feet outside the accused's house by the last guest to leave a feast in a nearby house which had been attended by the deceased, the accused and many others.

This last guest was the first person to find deceased lying there and asked him what had happened to him and the deceased stated that the accused had assaulted him. Shortly afterwards the deceased's three daughters were sent to his assistance by this guest and the deceased again stated to his daughters that the accused had struck him with a parang.

These dying declarations, corroborated to some extent by the evidence of the accused's conduct in passing close by the dying man attended by his children without rendering any assistance or, indeed, taking any notice whatever of their presence, and the presence of blood-stains on a mat found on a platform attached to his house, were the only evidence that it was the accused who had struck the fatal blows. At the close of the case for the prosecution, Counsel for the defence made a submission under Section 190 of the Criminal Procedure Code that no case had been made out which would warrant a conviction and argued that this section had not only the same meaning but also the same effect as Section 180 of the Criminal Procedure Code. The case of *Public Prosecutor, Johore v. Fong Ah Tong and another*[1] was not cited to me. Had that case been cited to me at the time, it is more than probable that I should have reserved the point for the decision of the Court of Appeal at the conclusion of the hearing.

My ruling on the point would not, however, have been different, even had this case been cited; for with the greatest respect I am unable to agree with the decision. Laville, J. in his judment in that case says :—

> In my view in that section the word Court means the Judge sitting to try a criminal case and